In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THOMAS N. BRADY, APPELLANT,
v.
HUBERT WORK, SECRETARY OF THE INTERIOR, and William Spry, Commissioner of the General Land Office. } No. 121.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEES.

The appellant Brady brought suit in the Supreme Court of the District of Columbia to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from issuing a patent to one Lillie S. Harner for certain public land and to compel the recognition by them of rights to that land asserted by him.

The bill of complaint disclosed the following facts (R. 1–6): Harry S. Harner had been successful in a contest proceeding before the Land Department against a homestead entry, as a result of which he was entitled to a thirty-day preference right to make entry of the land involved, and notice to that effect was sent him on December 27, 1918. This prefer-

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(*a*) We think it clear that the jurisdiction of the court below was not in issue. The only part of the motion to dismiss which questions the jurisdiction of the court is in reference to its jurisdiction to review the judgment of the Secretary and the Commissioner, not its jurisdiction to entertain the suit and award judgment. In other words, it was a plea to the merits of the case as made by the bill. That is not the jurisdiction which is within the purview of §250. *Fauntleroy* v. *Lum*, 210 U. S. 230, 235; *Blythe* v. *Hinckley*, 173 U. S. 501, 507. Compare *Lamar* v. *United States*, 240 U. S. 60; *Fidelity Trust Co.* v. *Gaskell*, 195 Fed. (C. C. A.) 865.

(*b*) The validity of an authority exercised under the United States was not drawn in question. That would constitute a challenge upon the constitutionality of the statutes conferring jurisdiction upon the Secretary and the Commissioner to administer the public land laws; that is, as to the competency and power of Congress to enact the laws. *Baltimore & Potomac R. R.* v. *Hopkins*, 130 U. S. 210, 222, 224. Certainly appellant is not making such an attack.

Nor is the scope and existence of the power or duty of these officers drawn in question. By filing his contest against the entry of Larson and asserting his better right to make entry of the land, as well as proceeding with the contest to which Mrs. Harner had been made a party, appellant conceded the power of the officers of the Land Department to hear and determine the controversy and the issues

presented, and admitted that it was the duty of those officers to pass judgment.

In truth, his complaint is not that the power and duty do not exist but that the exercise of them resulted adversely to him and that the decision is erroneous. Such a contention does not go to the question of the power and duty. *Champion Lumber Co.* v. *Fisher*, 227 U. S. 445; *Taylor* v. *Taft*, 203 U. S. 461; *U. S. ex rel. Sykes* v. *Payne*, 254 U. S. 618.

(c) There is no foundation for the assertion that the construction of any statute was drawn in question by appellees, defendants in the trial court. Nowhere in the motion to dismiss is there any mention of a statute, nor is the court asked to construe one. (R. 7.)

It follows that this court is without jurisdiction to entertain this appeal and it should therefore be dismissed.

The decision of the Secretary was made in the exercise of judgment and discretion in a matter within his jurisdiction and is not reviewable by the courts.

The contest proceeding initiated by the appellant raised an issue of the respective rights of Brady and Larson to the tract of public land here involved. The intervention of Mrs. Harner broadened the issue to include her asserted rights therein. The Land Department was the tribunal vested with authority to determine the relative rights of these three. *Bishop of Nesqually* v. *Gibbon*, 158 U. S. 155, 166, 167; *Cameron* v. *United States*, 252 U. S. 450, 460, 462.

The record does not disclose clearly the specific claims of these parties, and we have therefore incorporated as an appendix to our brief a copy of the decision of the Secretary on Brady's appeal. This, we hope, will aid the court in ascertaining the character of the case presented to the Land Department.

It appears from that decision that the department found that Mrs. Harner had resided upon and cultivated the lands involved for a number of years; that Brady's settlement was not made with a bona fide intent to acquire the land under the homestead law; and that Larson's filing was made in the face of an existing occupancy and improvement of the land.

From this decision it is clear that the Land Department's conclusion was based upon a finding of fact upon conflicting evidence to which it applied the law. The rule is well settled that the decision of the Department in such a case is not reviewable by the courts. Congress has not made the courts appellate tribunals to the Land Department, and mandamus or injunction is not the proper remedy. *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316; *Ness* v. *Fisher*, 223 U. S. 683; *Alaska Smokeless Coal Co.* v. *Lane*, 250 U. S. 549; *Hall* v. *Payne*, 254 U. S. 343.

Where a decision of the Land Department involves questions of fact, it is conclusive upon the courts. The same rule obtains where there is a mixed question of law and fact, unless the court is able to so separate the question as to see clearly what and where the mistake of law is. *Whitcomb* v. *White*, 214

U. S. 15, 16; *Ross* v. *Day*, 232 U. S. 110, 116, 117; *Bowen* v. *Hickey*, 53 Calif. App. 250 (200 Pac. 46), certiorari denied, 257 U. S. 656.

It is asserted that Brady's contest resulted in the cancellation of Larson's entry and that the former was therefore entitled to a preference right of entry under §2 of the Act of May 14, 1880, c. 89, 21 Stat. 141, as amended by the Act of July 26, 1892, c. 251, 27 Stat. 270; Comp. Stat. Ann. 1916, §4537. That act grants such a right to one who has by a contest procured the cancellation of a homestead entry. It is argued that the Secretary of the Interior took away this statutory right by denying Brady that preference. While it is true that the proceeding which resulted in the cancellation of Larson's entry was initiated by Brady's contest, it can not be said that the entry of Larson was canceled solely as a result of Brady's participation in the proceeding, for the intervention of Mrs. Harner in effect made her a contestant against both Brady and Larson. It would be an extreme construction of the statute to hold that in a situation such as was presented to the Secretary, it was his duty to allow Brady a preference right of entry notwithstanding his decision that Mrs. Harner's right was superior and entitled to recognition.

Moreover, if there was any error in the decision of the Land Department, the remedy of appellant is not by injunction or mandamus but by a trustee suit after the patent is issued. *Minnesota* v. *Lane*, 247 U. S. 243, 249, 250.

Mrs. Harner is an indispensable party.

As the decision of the Land Department granted Mrs. Harner the right to make entry of the land in controversy, she is an indispensable party to this suit, since the relief asked by Brady would, if granted, deprive her of her equitable rights recognized by the Department. *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 578; *New Mexico* v. *Lane*, 243 U. S. 52, 58.

CONCLUSION.

The judgment of the Court of Appeals was right and should be affirmed.

JAMES M. BECK,
Solicitor General.

H. L. UNDERWOOD,
Special Assistant to the Attorney General.

OCTOBER, 1923.

OCTOBER 20, 1920.

D. 49512.

THOMAS N. BRADY
v.
RUDOLPH L. LARSON AND LILLIE S. HARNER.

Phoenix, 041350, 041781.

Contest dismissed and land awarded to Harner. Affirmed.

APPEAL FROM THE GENERAL LAND OFFICE.

Lillie S. Harner, formerly Swift, made homestead entry February 18, 1907, at Phoenix, Arizona, land office, for lots 6 and 7, E. ½ SW. ¼, Sec. 6, T. 1 N., R. 6 E., G. & S. R. M. The land involved was withdrawn in July, 1902, and is still in Second form withdrawal under the reclamation act. It appears that later entrywoman submitted proof which, on September 8, 1913, the General Land Office held for rejection for error in the notice of publication as well as for insufficient evidence of her naturalization. Subsequently she filed a relinquishment of the entry and on November 10, 1913, Fred William Rattkammer made homestead entry for the land as described. On October 27, 1915, Harry B. Harner, husband of Lillie S. Harner, contested Rattkammer's entry, notice of which was served, but Rattkammer failed to answer the charges and later his entry was canceled. Subsequently the local officers, being of the opinion that lands which had been relinquished in whole or part were subject to settlement and entry under the reclamation law, allowed the preference right of entry to Harry B. Harner. Notice of their action was mailed to Harner, but was returned unclaimed.

On February 17, 1919, Rudolph L. Larson filed homestead application for the land in question which was allowed, and on March 13, 1919, Thomas N. Brady contested Larson's entry upon the ground that he, Brady, was a settler on the land when Larson's entry was allowed. Prior to the date set for a hearing on April 14, 1919, Lillie S. Harner filed a petition to be allowed to intervene in the case, and she asked that the hearing be continued, which was allowed and a hearing was had on April 22, 1919, when all parties appeared and submitted testimony.

After the conclusion of the testimony the local officers held that Lillie S. Harner had the superior right to the land, and they recommended that Larson's entry be canceled and that Lillie S. Harner be allowed to enter the land. On appeal their action was sustained by the Commissioner of the General Land Office in his decision of February 14, 1920, from which Larson and Brady have, separately appealed to this Department.

Careful examination and consideration of the testimony offered constrains the Department to affirm the concurrent action that has been taken in the case. The testimony shows that Brady was on the land with his wife and children and was residing there at the date of the hearing, but the Department is not convinced that he was there in good faith. The testimony shows that he had other land near that in question and his settlement was used, it is apparent, more as a matter of convenience than any other purpose on his part to establish and make the claim his permanent home. In this view of the case he was not a *bona fide* settler, and if he was not he had no claim, such as is alleged, and his contest was properly dismissed.

It was shown that Lillie S. Harner made homestead entry of the land involved and she built on

the land a house and furnished it, and that, together with her other improvements thereon, she spent approximately $1,500. Her proof, it appears, was not accepted mainly for the reason that she could not furnish satisfactory proof at that time of her naturalization, but in 1914 she married Harry B. Harner, who is a native-born citizen of the United States, and together with her husband she returned to the land in April, 1915, where they resided for three years. In 1916 it appears that they went to Glendale, Arizona, but she continued to exercise control over the land and raised crops thereon, cultivating 20 acres in the years 1916, 1917, 1918, and 1919. It seems that the husband remained at Glendale and during the latter part of 1918 he disappeared, leaving the neighborhood, since when he has not been heard of.

The witnesses introduced upon behalf of the entrywoman duly corroborated her testimony. They agreed that she established residence on the land in 1907 and lived there a number of years; that after marrying, as stated, she returned to the land with her husband and remained on the land for three years. They testified that at least 20 acres were cultivated to crops over a period of four years, and that the husband left the land and that section of the country in September, 1918, and that he had not since been heard from, although no reasons were known for his disappearance unless it was due to fear of an indictment against him for receiving and disposing of money on cattle which he mortgaged but never owned. Entrywoman herself stated she never received any consideration for the relinquishment in 1907 of her entry, and the testimony supports her in this.

The Department is convinced that the testimony shows that Brady had no valid legal right to the land

in question and that Larson's connection with the case is such as to preclude a serious consideration of his claim to the land. He was a clerk, the testimony shows, in the law office of the attorneys who represented Harner, but at no time showed diligence in following up any evidence of occupancy he found on the land. The fact that he found some one occupying the house and saw alfalfa growing on at least 20 acres of the land was sufficient evidence that the land was occupied by some one and not, therefore, subject to entry.

The entrywoman claims the right to make entry as the deserted wife of Harry B. Harner. The evidence of his disappearance has been referred to in another connection. As stated in the decision appealed from—

> The long connection of Mrs. Harner and her husband with the land, and the apparent good faith and the diligent effort to comply with the homestead law, * * * raise equities which can not properly be disregarded.

This view of the case, which is supported by a preponderance of the testimony that has been submitted, fully warranted the Commissioner in sustaining the local officers in holding that entrywoman had a better and superior claim to the land. The decision, therefore, properly dismissed the contest of Brady and properly held for cancellation Larson's entry, allowing entrywoman, Lillie S. Harner, to enter the land in the absence of any disqualifications appearing.

The decision appealed from is affirmed.

ALEXANDER T. VOGELSANG,
First Assistant Secretary.

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